

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Clifford E. Avery,
Petitioner

v.

Civil No. 92-cv-262-SM

Commissioner of the New Hampshire
Department of Corrections,
Respondent

O R D E R

Denied. This court found that the motion, styled as one for relief from judgment, and filed by petitioner under Fed. R. Civ. P. 60(b)(4), is in fact and reality a successive petition for habeas corpus relief. See Order, dated February 20, 2008, Docket No. 48. Accordingly, the court dismissed the petition on grounds that it was without jurisdiction to accept it for filing or entertain it absent prior authorization by the United States Court of Appeals for the First Circuit, which authorization had not been obtained by petitioner (and indeed had been denied on a prior occasion in this very case). Avery v. Wall, No. 07-1405 (1st Cir. November 30, 2007). See 28 U.S.C. § 2244(b)(3); Gonzalez v. Crosby, 545 U.S. 524, 530 (2005). If the motion is properly construed as a petition for habeas relief (see Gonzalez, supra; Rodwell v. Pepe, 324 F. 3d 66, 70 (1st Cir. 2003)) then there can be no legitimate debate about whether petitioner's

motion is a second or successive petition, or whether this court is without jurisdiction to accept it for filing or to consider it. Therefore, the court cannot certify that petitioner has "made a substantial showing of the denial of a constitutional right," as there is no constitutional right to file a second or successive habeas petition.

SO ORDERED.



Steven J. McAuliffe
Chief Judge

June 5, 2008

cc: Clifford E. Avery, pro se